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Constitutional Law-Interstate Commerce

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—Congress passed an act establishing a National Bituminous Coal Commission with power to set up code districts and separate boards for each district for the purpose of administering the codes contained in the act. By the code the boards were given power to fix the price of coal, as well as maximum hours of labor and minimum wages at the mines. The present actions were begun shortly after the act became effective and were consolidated in the argument before this court. The chief case was a suit by a stockholder to enjoin the corporation from complying with the provisions of the Code. Held, that mining is not interstate commerce and thus the regulation of hours of labor and wages by Congress was unconstitutional. Further, that the statute was not separable, so that the whole act including regulation of prices in the coal industry was unconstitutional.¹

In view of the fact that there were three opinions in this case, it might be well to outline them. The majority opinion held that the sale of goods to be shipped in interstate commerce was interstate commerce and could be

8 18 A. L. R. 1449; 69 A. L. R. 637. The courts of New York allow a request to go to the jury if made any time before entry of judgment by the clerk, *Brown Paint Co. v. Reinhardt* (1914), 210 N. Y. 162, 104 N. E. 124. On this question there seems to be a tendency on the part of the courts not to lay down strict rules, but to hold that the requesting party must make his request at the earliest opportunity after the ruling of the court, *Nead v. Hershman* (1921), 103 Ohio St. 12, 132 N. E. 19. The opportunity of a party to make his request to go to the jury cannot be defeated by any quick action of the court, *International Battery Co. v. Westerich* (1918), 182 App. Div. 843, 170 N. Y. Supp. 149.

⁹ *Laredo Nat. Bank v. Gordon* (1932), 61 F (2d) 906, cites the *McKinney* case to the effect that parties may not play fast and loose with the courts in withdrawing their motions after they have been ruled upon.

¹ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855.

regulated;² that mining was not interstate commerce, and hence regulation of hours of labor and wages in the mining industry was not warranted by the federal commerce power; that this statute was not separable;³ that, as a consequence, it was not necessary to determine the constitutionality of the price-fixing provisions.

The separate opinion by Chief Justice Hughes concurs with the majority in holding that regulation of hours of labor and wages was unwarranted, but on the ground that such regulation is not due process of law.⁴ The Chief Justice then dissents from the majority and maintains that the statute is separable⁵ and that regulation of prices for coal to be shipped in interstate commerce pursuant to contracts already made is not a violation of the due process clause of the fifth amendment.⁶

The dissenting opinion contends that sale of coal to be shipped in interstate commerce is interstate commerce, and that regulation of prices for such sales is not a violation of due process of law;⁷ that the statute is separable; that as to the provisions granting power to regulate hours of labor and wages these suits were premature.⁸

Since Chief Justice Marshall's celebrated opinion in *Gibbons v. Ogden*,⁹ it has been rather consistently held that commerce is more than traffic—it is intercourse.¹⁰ This case adopts that definition.¹¹ Interstate commerce is intercourse and traffic between persons, involving transportation of persons or property beyond state lines, or the purchase, sale, and exchange of commodities by persons in different states, or when shipment of the goods beyond state lines is contemplated.¹² But manufacture is not commerce;¹³ neither

² *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 867.

³ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 875.

⁴ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 876.

⁵ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 877.

⁶ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 877.

⁷ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 883.

⁸ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 886.

⁹ (1824), 9 Wheat. 1.

¹⁰ Willis, *Constitutional Law* (1936), p. 288, *Gloucester Ferry Co. v. Pennsylvania* (1884), 114 U. S. 196, *Addyston Pipe and Steel Co. v. United States* (1899), 175 U. S. 211; *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.* (1919), 252 U. S. 436, *Mondou v. N. Y. N. H. & H. R'y. Co.* (Second Employer's Liability Cases) (1911), 223 U. S. 1, *Federal Trade Commission v. Pacific States Paper Association* (1926), 273 U. S. 52. But there have been cases tending to confine the definition of commerce to transportation. *Hammer v. Dagenhart* (1918), 247 U. S. 251; *Paul v. Virginia* (1869), 8 Wall. 168. But these are of little significance in view of the many cases following *Hammer v. Dagenhart* which have adopted the broad definition. *Board of Trade v. Olsen* (1923), 262 U. S. 1; *Stafford v. Wallace* (1922), 258 U. S. 495, *Brooks v. United States* (1925), 267 U. S. 432; *Ramsay Co. v. Associated Bill Posters of United States and Canada* (1923), 260 U. S. 501.

¹¹ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 867.

¹² *Gloucester Ferry Co. v. Pennsylvania* (1884), 114 U. S. 196, *Addyston Pipe and Steel Co. v. United States* (1899), 175 U. S. 211.

¹³ *Kidd v. Pearson* (1888), 128 U. S. 1, *United States v. E. C. Knight Co.* (1895), 156 U. S. 1, *Crescent Cotton Oil Co. v. Mississippi* (1921), 257 U. S. 129.

is mining.¹⁴ It would seem by this authority and by the fact that none of the opinions, including the dissent, raised this issue, that it is accepted. Nor can it be seriously contended that interstate transportation had begun when the regulation of hours of labor and wages was to be enforced, for the cases are uniform in holding that interstate commerce in this sense does not begin until delivery of the goods to a carrier for shipment.¹⁵ The regulation attempted here was certainly to be effective before coal was to be shipped. It related to the operation of mining the coal.¹⁶ So it would seem that the parts of the statute providing administrative machinery for regulating hours of labor and wages in the bituminous coal industry were unconstitutional because coal mining is not interstate commerce. The validity of regulation of hours of labor and wages is, then, so far as this case is concerned, no longer a pertinent inquiry.¹⁷

This part of the statute being unconstitutional, there remains the question as to the validity of the price-fixing provisions. Substantially all the coal mined by these companies was for shipment to other states pursuant to contracts made before the coal was mined.¹⁸ Such sales are held to be interstate commerce.¹⁹ Upon this point the majority and minority opinions agree.²⁰ The interstate character of these shipments has even been upheld in the face of the possibility that the goods may never be shipped out of the state, but instead diverted to a local market.²¹ But the interstate commerce power is still limited by the due process clause of the fifth amendment.²² Although regulation by the federal government of the price of goods to be shipped in interstate commerce pursuant to contracts already made has not previously been upheld, it has been held that for a state to regulate prices in intrastate commerce is not a violation of the due process clause of the fourteenth

¹⁴ *United Mine Workers of America v. Coronado Coal Co.* (1922), 259 U. S. 344.

¹⁵ *Lemke v. Farmer's Grain Co.* (1922), 258 U. S. 50; *General Oil Co. v. Crain* (1907), 209 U. S. 211; *McCluskey v. Marysville & N. Ry. Co.* (1916), 243 U. S. 36; *Texas & N. O. Ry. Co. v. Sabine Train Co.* (1912), 227 U. S. 211; *Railroad Commission v. Texas and P. Ry. Co.* (1912), 229 U. S. 336; *Illinois Central Ry. Co. v. Du Fuentes* (1914), 236 U. S. 157; *Hughes Bros. Timber Co. v. Minnesota* (1926), 272 U. S. 469; *Hammer v. Dagenhart* (1918), 247 U. S. 251.

¹⁶ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 869.

¹⁷ The power of Congress to regulate hours of labor in interstate commerce is established, 34 Stat. 1415, though not as yet by any decision of the Supreme Court. Also, it has been held that a statute establishing a minimum wage for railway employers is valid, *Wilson v. New* (1917), 243 U. S. 232, but the fact that this was emergency legislation during the World War throws some doubt on this case.

¹⁸ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 877.

¹⁹ *Dahnke Walker Mill Co. v. Bondurant* (1921), 257 U. S. 282; *Crenshaw v. Arkansas* (1912), 227 U. S. 389; *Weeks v. United States* (1917), 245 U. S. 618; *Pennsylvania Ry. Co. v. Somnan Shaft Coal Co.* (1916), 242 U. S. 120.

²⁰ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 867.

²¹ *Willis*, *Constitutional Law* (1936), p. 370.

²² *Monongahela Navigation Co. v. United States* (1893), 148 U. S. 312; *Adair v. United States* (1908), 208 U. S. 161; *Atchison, Topeka and Santa Fe Ry. Co. v. United States* (1932), 284 U. S. 248.

amendment.²³ So, also, it has been maintained since *Gibbons v. Ogden*²⁴ that the power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the constitution.²⁵ It would seem, then, that the Chief Justice is logical when he says that the state's power to regulate prices in intrastate commerce having been upheld, Congress is not to be denied a power with respect to interstate commerce which is enjoyed by the states in the regulation of intrastate commerce.²⁶ In this principle the dissent concurs, pointing out that conditions in the milk industry in the state of New York which induced the court to uphold price-fixing provisions were very similar to the conditions in the bituminous coal industry.²⁷

The third point upon which the opinions differ is the separability of the parts of the statute. The majority, in the face of an express provision in the statute that if a part was declared unconstitutional, the rest should not therefore be invalidated, declared that the statute was not separable. The Chief Justice maintained that the statute was separable and the dissent avoided this question by holding that the suits were premature as to the labor provisions and thus the court need only pass on the constitutionality of one part of the statute—the price-fixing provisions. A part of a statute may be invalid and yet the remainder be valid.²⁸ Also, a valid part of a statute may be enforced if separable from the invalid part.²⁹ But before a valid part will be upheld where the other part is invalid, it must be separable, and it must be proved that such was the intention of the legislature. Thus, the intent of Congress in passing this act becomes important. This act contained a provision that if part was declared unconstitutional, the application of the other provisions should not be affected thereby.³⁰ This is certainly strong evidence that Congress intended the statute to be separable;³⁰ in fact, it reverses the presumption of inseparability and creates a presumption of separability.³¹ But when we add to this the testimony of the author of this act before a House Committee to the effect that its sponsors still want

²³ *Stephenson v. Binford* (1932), 287 U. S. 351, *Nebbia v. People of New York* (1934), 291 U. S. 502. It is significant that Justice Sutherland who wrote the opinion in the former case is also the author of the majority opinion in the present case. This may throw some light on the reason for the majority approach to the decision of this case, especially the treatment of the price regulation problem.

²⁴ (1824), 9 Wheat. 1.

²⁵ *Mondou v. N. Y., N. H. & H. Ry. Co.* (1912), 223 U. S. 1; *Brown v. Maryland* (1827), 12 Wheat. 419; *Leisy v. Hardin* (1890), 135 U. S. 100; *Cummings v. Chicago* (1902), 188 U. S. 410; *Butterfield v. Stranahan* (1904), 192 U. S. 470.

²⁶ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 876.

²⁷ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 881.

²⁸ *Bank of Hamilton v. Dudley's Lessee* (1829), 2 Pet. 492; *Railroad Companies v. Schutte* (1880), 103 U. S. 118.

²⁹ *Field v. Clark* (1891), 143 U. S. 649; *Packet Co. v. Keokuk* (1877), 95 U. S. 80; *Presser v. Illinois* (1885), 116 U. S. 252; *Baldwin v. Franks* (1886), 120 U. S. 678.

³⁰ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 877.

³¹ *Carter v. Carter City Coal Co.* (1936), 56 S. Ct. 855, 877.

the act even if the labor provisions are stricken out, because the act stabilizes the industry,³² it would seem that the Chief Justice should win his point again.
D. C.

SALES—PASSING OF TITLE.—Income and profits taxes were assessed against respondent by petitioner in pursuance of an Act levying taxes on income derived from sources within the United States. Respondent was a Mexican corporation selling crude oil produced in Mexico to firms in the United States. The contracts of sale were negotiated and payments were made in the United States. The oil was shipped under either f. o. b. or c. i. f. contracts which provided for inspection and gauging by representatives of both the buyer and seller at the point of destination. The c. i. f. contracts provided for ultimate delivery at points within the United States. Held, the taxes were unlawfully assessed, since the income was derived from sources without the United States.¹

In general, when there is a contract for the sale of unascertained goods, title passes when there is an unconditional appropriation to the contract, either by the seller with the consent of the buyer, or by the buyer with the consent of the seller, and delivery to a carrier for transmission to the buyer is presumptively an unconditional appropriation.² The assent by the buyer to the appropriation may be given in advance.³ In cases of contracts providing for f. o. b. shipment,⁴ this prior assent is presumed,⁵ and title passes to the buyer when the goods are put into the hands of the carrier at the point of shipment.⁶ That title passes on shipment is also true in case of contracts calling for shipment c. i. f.⁷ point of destination.⁸

³² Hearings Before House Subcommittee of the Committee on Ways and Means, 75th Congress, 1st Session on H. R. 8479, 35.

¹ Commissioner of Internal Revenue v. East Coast Oil Co. (1936), 85 F. (2d) 322.

² Uniform Sales Act, sec. 19; Alderman Bros. v. Westinghouse (1918), 92 Conn. 419, 103 A. 267; Smith v. Edwards (1892), 156 Mass. 221, 30 N. E. 1017; Robbins v. Brazil Syndicate (1917), 63 Ind. App. 455, 114 N. E. 707.

³ Northern Grain Co. v. Northern Trading Co. (1921), 117 Wash. 422, 210 P. 903; Lieb Packing Co. v. Troche (1917), 136 Minn. 345, 162 N. W. 449; Smith v. Edwards (1892), 156 Mass. 221, 30 N. E. 1017.

⁴ F. o. b. shipment is one where the goods are put into the hands of the carrier free of expense to buyer.

⁵ Alderman Bros. v. Westinghouse (1918), 92 Conn. 419, 103 A. 267; Standard Casing Co. v. California Casing Co. (1922), 233 N. Y. 413, 135 N. E. 834; Hoffman v. Wisconsin Lumber Co. (1921), 207 Mo. App. 440, 229 S. W. 289; Lieb Packing Co. v. Troche (1917), 136 Minn. 345, 162 N. W. 449; Hauck Food Products Co. v. Stevenson (1922), 203 App. Div. 308, 197 N. Y. S. 34.

⁶ Standard Casing Co. v. California Casing Co. (1922), 233 N. Y. 413, 135 N. E. 834; Hauck Food Products v. Stevenson (1922), 203 App. Div. 308, 197 N. Y. S. 34; Disch v. National Surety Co. (1922), 203 App. Div. 723, 196 N. Y. S. 833; Rosenberg Bros. v. Buffum (1922), 234 N. Y. 338, 137 N. E. 609; United States v. Andrews (1907), 207 U. S. 229, 28 S. Ct. 100; Detroit Southern R. Co. v. Malcolmson (1907), 144 Mich. 172, 107 N. W. 915.

⁷ C. i. f. means that the price includes cost, insurance and freight.

⁸ Smith v. Marano (1920), 267 Pa. 107, 110 A. 94; Northern Grain Co. v. Northern Trading Co. (1921), 117 Wash. 422, 210 P. 903; Smith v. Moscahlades (1920), 193 App. Div. 126, 183 N. Y. S. 500; Bullard v. Grace (1924), 210 App. Div. 476, 206 N. Y. S. 335.